No. 21,176

IN THE

United States Court of Appeals

For the Ninth Circuit

SAMUEL GOLD, HOWARD GUY HALBETT, JOHN FRANK FUSCO,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLEE'S ~~ANSWERING~~ BRIEF

JOSEPH L. WARD,
United States Attorney.
ROBERT S. LINNELL,
Assistant United States Attorney.
305 Post Office Building,
Las Vegas, Nevada,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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APPELLEE'S ANSWERING BRIEF

I.

STATEMENT OF JURISDICTIONAL FACTS

An indictment was returned in the United States District Court for the District of Nevada in two counts, the first count charging the Appellants and a co-defendant, Antoinette Mary Fusco, with violation of Title 18, United States Code, Sections 1462 and 2, and the second count charging the Appellants and Antoinette Mary Fusco with violating Title 18, United States Code, Section 371 (R. 5).[1]

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[1] "R." as used herein refers to the Record on Appeal. Unless otherwise indicated, the reference will be to the Record on Appeal of Appellants Gold and Halbett. References to the separate Record on Appeal as to Appellant Fusco will be so designated.

Under the provisions of Title 18, United States Code, Section 3231, the District Court had original jurisdiction. Upon the jury's verdict of guilty each Appellant was sentenced. Appellant Gold was sentenced with respect to both counts I and II (R. 39); Appellant Halbett was sentenced with respect to count II only (R. 38); and Appellant Fusco was sentenced with respect to count II only (R-Fusco 39). From these judgments of the District Court the Appellants have now appealed.

It is conceded that this Court has jurisdiction over appeals from such final decisions of a District Court under the provisions of Title 28, United States Code, Section 1921, and by virtue of Rule 37(a) of the Federal Rules of Criminal Procedure.

II.

STATEMENT OF THE CASE

This is an appeal from the convictions of Samuel Gold, Howard Guy Halbett and John Frank Fusco, in the United States District Court for the District of Nevada. A co-defendant Antoinette Mary Fusco was prosecuted separately under the provisions of Rule 20 of the Federal Rules of Criminal Procedure in New Jersey.

The indictment (R. 5) charged the Appellants in count I thereof with using and causing to be used a common carrier for the carriage in interstate commerce of obscene motion picture film in violation of

Title 18, United States Code, Sections 1462 and 2. Count II charged the Appellants with conspiring to violate Title 18, United States Code, Section 1462, all in violation of Title 18, United States Code, Section 371.

The jury convicted Appellant Gold of both counts, and found the Appellants Halbett and Fusco guilty of count II only (T. 418-423).[2]

The evidence presented to the jury showed that agents of the Federal Bureau of Investigation commenced a surveillance during business hours of Eastern Film Laboratories, 19½ Pacific Street, Henderson, Nevada, on October 27, 1965, which surveillance was maintained between 8:00 A.M. and 6:00 P.M. through October 29, 1965, and was resumed November 1, 1965 to continue through November 3, 1965 (T. 49-53, 59-60). No significant activity was noted at the premises until approximately 2:40 P.M. on November 3, 1965, when Special Agent Salisbury observed Appellants Gold and Halbett loading cartons into a Cadillac automobile (T. 61). The surveilling agents observed Appellants Halbett and Gold leave the premises and at approximately 3:20 P.M. the vehicle was observed as was Appellant Gold at the United Air Lines freight dock at McCarran Field, Las Vegas, Nevada (T. 62). Appellant Gold was then observed to deliver the five cartons to United Air Lines' Station Agent Arthur Hooker (T. 150, 169).

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[2]"T." as used herein refers to the Reporter's Transcript of the Proceedings.

Mr. Hooker completed the air waybill (Exhibit 3) and the freight charge of $45.20 was paid in cash (T. 85, 88).

The waybill was made up from the information supplied in part by the shipper to Mr. Hooker and reflected that the cartons contained electronic controls. The shipping document (Exhibit 3) as well as the labeling on the cartons themselves reflected that the shipper was Pont Distributors, 1020 South First Street, Las Vegas, Nevada (T. 210). Special Agent Murray had previously found that 1020 South First Street, Las Vegas, was a non-existent address and the agent had been unable to identify any company by the name of Pont Distributors (T. 126, 127).

Upon the shipment's being delivered to United Air Lines, and after Appellant Gold had departed from the airport, United Air Lines' Customer Service Manager James M. Dunne was contacted by Special Agent Doyle and Special Agent Murray and informed that the agents had reason to believe that the description on the air waybill of the contents of the shipment was inaccurate, and that the shipper's address was nonexistent (T. 118, 189-190). Mr. Dunne was not informed of the suspected contents of the shipment (T. 118, 190). Mr. Dunne, upon receiving this information, indicated that he would consider the matter (T. 191) and thereafter made some investigation of the situation (T. 105).

Mr. Dunne thereafter decided to open one of the cartons (T. 115) pursuant to the carriers' right of

inspection under their tariff (Exhibit 9). At the time of the opening only an airline supervisor was present (T. 118, 119). The decision to examine the contents of the carton was his own and the opening was not accomplished at the request or instruction of the agents (T. 105), although he would not have opened the shipment had not he been contacted by the agents and informed of their suspicions.

Upon examining the contents of the carton Mr. Dunne looked at a portion of the film and determined to contact the agents (T. 108), who responded an hour or so later (T. 121). Dunne showed the film to the agents who made arrangements for a projector and then examined by use of the projector three of the rolls of film (T. 153). After determining the nature of the films the agents advised Mr. Dunne to hold the shipment under lock and key, Dunne having determined not to repackage the shipment and send it (T. 109, 110). The following morning at approximately 10:00 o'clock the agents returned with a search warrant (Exhibit 12) and seized the shipment.

The agents were aware of the probability that the shipment contained obscene film (T. 185, 186).

Roger Schuerman, an air freight agent for United Air Lines at the Newark, New Jersey airport testified that on November 4, 1966, Appellant John Fusco and an unidentified woman came to his counter to pick up a shipment and made reference to the air waybill number (T. 237). The unidentified woman gave Schuerman a description of the shipment but was

corrected by Appellant Fusco as to the number of cartons and the approximate weight (T. 243, 244).

Mr. Schuerman further testified that United Air Lines services Newark, New Jersey, Cleveland, Chicago, Pittsburgh, Salt Lake, Las Vegas, Reno, Denver and Omaha, among other places (T. 242), and that United Air Lines' service is available to anyone who wishes to pay for it (T. 241). Evidence further showed that tariffs had been issued for United Air Lines by the Civil Aeronautics Board (Exhibit 9) and that it was a common carrier engaged in interstate commerce (T. 249). The Trial Court, in addition, took judicial notice that United Air Lines is a common carrier engaged in interstate commerce (T. 341).

Agent Jenkins of the Federal Bureau of Investigation in New Jersey observed Appellant Fusco and Antoinette Fusco at the United Air Lines Office at the Newark Airport on the afternoon of November 4, 1965 (T. 255). On the following morning he arrested Antoinette Fusco in Jersey City, New Jersey at her residence where Western Union money order receipts (Exhibit 15), bearing the name of Samuel Gold, were seized.

Counsel and the Appellants stipulated that the film seized and admitted into evidence (Exhibits 8C, 8D, 8E, 4B, 5B, 6B and 7B) depicted obscene scenes as the term has been defined by the Supreme Court (T. 394).

Motions for acquittal were made by Appellants at the close of the Government's case (T. 285, 297) and

granted as to Appellants Halbett and Fusco as to count I only. They were denied in all other respects. The motions were renewed at the close of all evidence (T. 344) and denied as to Appellants Gold and Fusco (T. 349). Ruling was reserved with respect to Appellant Halbett (T. 349), but denied following the verdict (T. 424). Appellants filed a written motion for judgment of acquittal or in the alternative for a new trial (R. 31, R-Fusco 33), which motions were also denied (R. 36).

Appellants have prosecuted this appeal specifying as error the following:

1. That the Trial Court abused discretion in refusing to inquire into the religious background of the jury venire.

2. That the Trial Court committed error in judicially noticing that United Air Lines is a common carrier.

3. That the Trial Court committed error in denying Appellants' several motions for judgment of acquittal or for a new trial.

III.

SUMMARY OF ARGUMENT

1

The Trial Court properly exercised its discretion in refusing to inquire into the religious affiliations of the prospective jurors.

2

The Trial Court properly took judicial notice that United Air Lines is a common carrier and alternatively, any error committed did not prejudice the Appellants.

3

The verdicts were adequately supported by the evidence and therefore the Trial Court properly denied the several motions for acquittal or for a new trial.

IV

ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO INQUIRE INTO THE RELIGIOUS AFFILIATIONS OF THE PROSPECTIVE JURORS

In the course of selecting the jury counsel for Appellants Gold and Halbett requested the Court as follows (T. 17):

> "Mr. Sutton: Excuse me, Judge.
>
> "I would like you to inquire, if the Court please, the religious background of each of these individuals, that is, L.D.S. church or Catholic church, and if they are active in the church.
>
> "The Court: Now, you are asking me to find out how religious they are? I won't inquire into that. I will ask them the denomination, if any, to which they belong."

The Court made the following observation prior to the time for challenging jurors (T. 34):

"The Court: Mr. Sutton, I have decided against inquiring into the religious affiliation of these jurors. I don't think that it's a proper inquiry to make. I don't think it has anything to do with their qualifications to sit as fair and impartial jurors. For that reason, I will not ask them to give us their religious affiliations, if any.

"I put that on the record, now, so your points —that your position is recorded. You do request that information?

"Mr. Sutton: Yes, I do, your Honor, because of the nature of the case."

Counsel concedes (Opening Brief, p. 10) that the questions to be asked the jury on voir dire are discretionary with the Court but urges that some religious groups take a more narrow view of obscenity than others. Yet, Appellants do not state which groups take which view. Certainly the exercise of the discretion of the Trial Court will not be disturbed in the absence of a clear showing of abuse in that discretion. *Brady v. United States,* 9 Cir. 1928, 26 F.2d 400, 403, cert. den. 278 U.S. 621; *Noland v. United States,* 9 Cir. 1926, 10 F.2d 768

In *Yarborough v. United States,* 4 Cir. 1956, 230 F.2d 56, cert. den. 351 U.S. 969, that Court stated, at page 63:

"Other contentions of appellant are so lacking in merit as to warrant only the briefest mention. He contends that the trial judge erred in not making inquiry of the jurors on the voir dire as to their religious affiliations. No matter of any religious significance whatever was involved in

> the case; and appellant does not show how he could have been prejudiced in any way by the refusal of the judge to make inquiry of the jurors as to a private matter of this sort. There is nothing to show that he belonged to any religious sect or was charged with a crime as to which any sect held views different from the rest of mankind, and the jurors were interrogated fully as to all matters which might show interest or bias on their part or could affect their fitness to serve as jurors in the cause. It is well settled that what questions shall be asked of jurors on the voir dire is a matter resting in the sound discretion of the trial judge; and there is nothing here to show that the discretion was in any way abused."

In view of the foregoing, it is respectfully submitted that the Trial Court did not abuse its discretion in refusing to permit counsel to inquire, or to himself inquire, into the religious affiliations of the prospective jurors.

THE TRIAL COURT PROPERLY TOOK JUDICIAL NOTICE THAT UNITED AIR LINES IS A COMMON CARRIER AND ALTERNATIVELY, ANY ERROR COMMITTED DID NOT PREJUDICE THE APPELLANTS

Appellants urge (Opening Brief, pp. 11-15) that there was prejudicial error committed by the Trial Court in judicially noticing that United Air Lines is a common carrier. Their argument appears to be that this was error because an element of the offense was involved. In this regard the Trial Court stated (T. 340):

"On the question of whether or not the Court, as requested by the Government, can judiciously notice that the United Airlines is a common carrier engaged in interstate commerce, as I indicated to counsel, I had little doubt the Court could judiciously notice this status, but I wasn't sure the Court could judiciously notice if it was an element of a crime. On further examination, I'm now satisfied that it can be judiciously noticed, although one of the elements of the offense charged in Count I was that a common carrier in interstate commerce was used for carriage of the motion picture film as charged. I found citations to the effect that Courts have in the past judiciously noticed that railway companies were engaged in interstate commerce. I would think that is close enough, so, I will judiciously notice that United Airlines is engaged in interstate commerce and is a common carrier, and will so advise the jury at the time I instruct them. However, I'm going to tell them, further, that there is evidence before them in addition to what the Court judiciously notices, of the fact that United Airlines is a common carrier engaged in interstate commerce."

In addition, however, to the judicial notice there was evidence before the jury that United Air Lines was covered by the C.A.B. Tariffs (Exhibit 9), the admission of which into evidence was in no way limited. Further, there was the testimony of Mr. Schuerman that the airlines service was available to the general public for consideration (T. 241) and that United Air Lines is a common carrier (T. 249).

In *Miller and Company of Birmingham v. Louisville & N.R. Co.,* 5 Cir. 1964, 328 F.2d 73, 78, cert. den. 377 U.S. 966, the Appellate Court took judicial notice of the fact that a railroad was a common carrier.

> "Judicial notice will be taken of the existence and characteristics of established means of communication and transportation . . ." *Wharton's Criminal Evidence,* Twelfth Edition, Volume 1, p. 126 (Judicial Notice § 58).

It is therefore urged that the Court properly took judicial notice of the fact that United Air Lines is a common carrier. Alternatively any error committed would not, it is submitted, be prejudicial to Appellants in view of the other evidence of the fact presented to the jury in the form of Exhibit 9 and the testimony of the witness Schuerman.

THE VERDICTS WERE ADEQUATELY SUPPORTED BY THE EVIDENCE AND THEREFORE THE TRIAL COURT PROPERLY DENIED THE SEVERAL MOTIONS FOR ACQUITTAL OR FOR A NEW TRIAL

As to Appellant Gold, it is urged (Opening Brief, pp. 15-19) that his motions for acquittal or for a new trial should have been granted because of the fact (which Appellee admits) that the shipment of obscene film never left United Air Lines freight office in Las Vegas on its journey to New Jersey. Section 1462 of Title 18, United States Code, as enacted in 1948, proscribed the knowing *deposit* with any carrier

for carriage in interstate commerce of obscene matter. This section was amended in 1958 to read:

> "Whoever . . . knowingly uses any . . . common carrier . . ."

for carriage in interstate commerce of obscene matter. The legislative history of the amendment indicates that it was the result of the decision in *Ross v. United States,* 10 Cir., 205 F.2d 619, wherein it was held that a violation of Section 1461 (dealing with the use of the mail) was complete upon the deposit in the mail of the obscene matter and therefore there was no venue to try the offense in the district of destination as would normally be permitted under the provisions of Title 18, United States Code, Section 3237.

The legislative history makes it abundantly clear that the purpose of the amendment was to make both Sections 1461 and 1462 continuing offenses thus overruling the effect of the *Ross* decision, supra, and giving rise to venue in the state or district of delivery. The legislative history is set forth in considerable detail in *United States v. Luros,* D.C. Iowa, 1965, 243 F. Supp. 160, 176 and in *United States v. West Coast News,* D.C.W.D. Mich. 1962, 30 F.R.D. 13.

Nowhere does the legislative history indicate that Courts intended to destroy the common understanding and meaning of the word deposit as the same originally appeared in the statute

It is therefore Appellee's position that one who deposits an item for shipment with the carrier, pre-

pays the charges and thereby surrenders physical custody and dominion over the items being shipped does "use" and "cause to be used" the interstate carrier within the meaning of the statute as amended. The position of the Trial Court is set forth without ambiguity (T. 299):

> "I take the position that the use of the words in the statute, 'knowingly, use of a common carrier for carriage,' means known use of a common carrier for purposes of transportation, to be transported, and I agree with Government counsel that the moment the shipment was tendered to the freight agent of United Airlines and the freight prepaid and a waybill made out and the Defendant Gold departed the scene that the language of the Statute, 'the knowing use of a common carrier for carriage,' that when Mr. Gold did these things that he knowingly used the common carrier for carriage in interstate commerce as those terms are used in Section 1462."

Although the writer has been unable to locate any reported decisions directly in point, Courts have held, for purposes of the Interstate Commerce Act, at least, that property is in interstate commerce from the time of its delivery to a carrier for shipment to another state. *United States v. So. Buffalo Ry. Co.,* D.C.N.Y. 1947, 69 F. Supp. 456, 459, affirmed 333 U.S. 771, 92 L. Ed. 1077, 68 S. Ct. 868.

Appellants urge (Opening Brief, pp. 20-21) that the several motions for acquittal should have been granted because the Trial Court committed error in

denying their motions to suppress the obscene film. The motion to suppress, they urge, should have been granted on the grounds that the shipment was seized as a result of an unlawful search and seizure.

In support of their position Appellants cite the dissenting opinion in *Marshall v. United States,* 9 Cir. 1965, 352 F.2d 1016. In that case the defendant had entrusted his landlady with a brief case with instructions to hold it for him and the landlady permitted agents of the Federal Bureau of Investigation to examine the contents of the brief case at their request. The majority of the Court in *Marshall,* supra, sustained the search. On September 29, 1966, however, in *Corngold v. United States,* Case No. 19,613, a majority of the judges of this Court overruled the *Marshall* decision. But in *Corngold,* supra, the officers participated in the examination of the shipment and it was apparent that the action of the airline representative was at the request of the agents. Additionally there was no search warrant involved in *Corngold.*

A different factual situation is presented by the present case from either the *Marshall* case or the *Corngold* case, for in the present case the agents merely informed the carrier that the information concerning the shipping document and labeling was believed to be false (T. 118, 189-190). The shipper was not informed of the suspected contents of the shipment as was the case in *Corngold* (T. 118, 190) and the carrier made an independent determination

to examine the shipment without any request or instruction from the agents (T. 105, 115). Further, the agents were not present when the carrier's representative, Mr. Dunne, and his supervisor examined the one carton of the shipment that was opened (T. 118, 119), also distinguishing the present case from the situation in *Marshall* and *Corngold*.

After Mr. Dunne had examined a portion of the contents of the opened carton, he felt that it ". . . should be someone else's business. I, therefore, notified the F.B.I." (T. 108.) In response to the notification the agents examined three of the rolls of film (T. 153) and the following morning seized the opened carton and the four unopened cartons pursuant to a search warrant (Exhibit 12), the validity of which is not challenged. In *Marshall* and *Corngold,* both supra, it does not appear that a search warrant was employed prior to the actual seizure.

Witness Dunne indicated (T. 109) that the next normally scheduled flight for the shipment in question would have been at 1:00 A.M. on November 4, 1965, but further indicated (T. 109) that it would depend on whether there was space available on the particular flight.

It is therefore Appellee's position that the opening of the package was ultimately accomplished by the carrier pursuant to its tariff and in no way for the purpose of satisfying the agents' interests in the shipment, nor was it a joint endeavor by the carrier and the agents.

Finally, Appellants Halbett and Fusco take the position (Opening Brief, pp. 21-24) that there was insufficient evidence to support their convictions under count II, the conspiracy charge. First, as to Appellant Fusco, it is stated (Opening Brief, p. 24) that he appeared at the United Air Lines counter in Newark, New Jersey, with a woman who did most of the talking, and that they had a shipping number on a piece of paper. Although it is apparent that the female, as is perhaps customary, did most of the talking, Appellant Fusco corrected her both as to the number of cartons in the shipment and as to the approximate weight of the shipment (T. 243, 244), thus indicating his personal knowledge and creating uncontroverted circumstantial evidence of his knowledge and participation in the alleged conspiracy.

As to Appellant Halbett, and again considering the evidence in the light most favorable to the Appellee (*Glasser v. United States,* 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457), the evidence shows that during the several days of surveillance conducted by the agents prior to the date of the shipment, no one, with the exception of a five or six year old female child (who entered the building on one occasion only) and an unidentified man (who was in the building for 17 minutes on November 2), entered or left the film laboratories which were under surveillance (T. 48-60). On November 3, Appellant Halbett was observed, along with Appellant Gold, loading the cartons into the Cadillac in which Gold was later observed at the

airport (T. 60). It is respectfully submitted that Appellant Halbett had to have knowledge of the conspiracy and contents of the shipment by reason of the foregoing circumstances and that this was sufficient evidence to justify his conviction.

The Trial Court's position on the question is set forth as follows (T. 347):

> "I'm aware of that. Well, there is no need of belaboring the point. I feel there is sufficient evidence to take Mr. Halbett to the jury as to Count II. They could find, I think—and it would be supported—First of all, that there was a conspiracy; that he knew of it; that he joined it and wilfully participated in it with intent to advance some object of it, and that's all that's necessary."

It is obvious that being the only person associating with Appellant Gold at the film laboratory on a regular and consistent basis during the period of surveillance, Appellant Halbett had to have knowledge of the conspiracy, and having committed the overt act of loading the Cadillac, and further, being bound by the acts of the other conspirators, it is respectfully submitted that the evidence supports his conviction.

V.

CONCLUSION

In view of the foregoing arguments and based upon the record herein, it is respectfully urged that there was no error committed by the Trial Court of a sufficient degree to require a reversal of the convictions of the Appellants and the same should therefore be affirmed.

Dated, Las Vegas, Nevada,
October 18, 1966.

Respectfully submitted,

JOSEPH L. WARD,
United States Attorney,

ROBERT S. LINNELL,
Assistant United States Attorney,
Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT S. LINNELL,
Assistant United States Attorney,
Attorney for Appellee.